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January 26, 2017

The Honorable Margo K. Brodie
United States Courthouse
225 Cadman Plaza East
Brooklyn, N.Y. 11201

Re: *Gray v. City of New York, et al.,* 14 CV 2488 (MKB) (JO)

Your Honor:

We represent the plaintiffs in this civil rights case in which defendants have moved for partial summary judgment. We write in response to defendants' letter to the Court, dated January 26, 2017, further arguing that Police Sergeant Mourad Mourad and Police Officers Jovaniel Cordova and John Hoder should be granted summary judgment as to plaintiffs' unreasonable handcuffing claim.

Defendants argue in their letter that Mourad and Cordova had a reasonable basis in having the mortally wounded Kimani Gray handcuffed at the scene of the shooting because they observed Kimani in possession of a gun prior to shooting him. However, as plaintiffs demonstrated in their opposition papers, there is a factual dispute as to whether Kimani possessed a gun on the night in question. If the jury decides that Kimani did not have a gun and was not otherwise engaged in illegal activity during the incident, Mourad and Cordova would have had no basis in having Kimani handcuffed, regardless of Kimani's injuries, and Mourad and Cordova would therefore be liable for excessive force.

If, on the other hand, the jury finds that Mourad and Cordova had a reasonable basis to believe that Kimani possessed a firearm, the jury must then decide whether Mourad and , Cordova's act in having the dying, nonthreatening and compliant Kimani rear-cuffed was objectively reasonable when defendants had found Kimani's alleged weapon on the ground and could have searched Kimani before cuffing him to eliminate any concern that he had a secondary weapon. The same analysis applies to Hoder. If Hoder, who responded to Mourad and Cordova's request for assistance, arrived on the scene, observed Kimani dying, and handcuffed Kimani pursuant to Mourad and Cordova's request without bothering to search Kimani, a jury could find that Hoder acted unreasonably. The recent Supreme Court case cited by defendants in their letter, *White v. Pauly,* does not change this.

A jury also has to decide that, even if initially handcuffing Kimani was reasonable, whether it was unreasonable for all three of the individual defendants to not have uncuffed Kimani after searching him and seeing that he was unarmed and defenseless. *See*

Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865 (1989) (in determining whether an officer acted reasonably in applying force, the jury must consider the "severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.").

Finally, as to defendants' argument that the right not to be handcuffed while mortally wounded was not clearly established, it is well settled that the "'the absence of legal precedent addressing an identical factual scenario does not necessarily yield a conclusion that the law is not clearly established.'" *Edwards v. Arnone*, 613 F. App'x 44, 47 (2d Cir. 2015) (quoting *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 251 (2d Cir. 2001)); *see also Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances."). As demonstrated in plaintiffs' brief, defendants were on notice that their conduct violated established law.

For the foregoing reasons, and for the reasons set forth in plaintiffs' brief, defendants' motion for partial summary judgment should be denied in its entirety.

Respectfully,

/s/

Richard Cardinale
Michael Hueston
Kenneth Montgomery

Copy: All counsel